

Nguyen (Migration) [2018] AATA 3643 (30 July 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Thi Hoang Van Nguyen

VISA APPLICANTS: Mr Minh Khai Pham
Mr Minh Huy Pham
Mr Minh Hoang Pham

CASE NUMBER: 1609476

DIBP REFERENCE(S): 2015070801

MEMBER: Scott Clarey

DATE: 30 July 2018

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the application for Prospective Marriage (Temporary) (Class TO) visas for reconsideration, with the direction that Mr Pham meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- - cl.300.211 of Schedule 2 to the Regulations
 - cl.300.212 of Schedule 2 to the Regulations
 - cl.300.213 of Schedule 2 to the Regulations
 - cl.300.214 of Schedule 2 to the Regulations
 - cl.300.215 of Schedule 2 to the Regulations
 - cl.300.216 of Schedule 2 to the Regulations
 - cl.300.221 of Schedule 2 to the Regulations; and
- the secondary visa applicants meet
 - cl.300.311 of Schedule 2 to the Regulations.

-
-
-
-
-
-

Statement made on 30 July 2018 at
10:30am

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TU) visa – Subclass 300 (Prospective Marriage)
– Genuine intention to marry – Revised proposed date for marriage – Regular daily contact – Periodic
money transfer – Sponsor’s frequent travels – Knowledge of closest friends and extended family –
Inception of relationship – Timeline of applicant’s divorce – Decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 300.211, 300.212, 300.213, 300.214,
300.215, 300.216, 300.221, 300.311

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant Mr Minh Khai Pham (Mr Pham) a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. Mr Pham applied for the visa on 3 June 2015. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on 16 June 2016 on the basis that Mr Pham did not satisfy cl.300.215 and cl.300.216 of Schedule 2 to the Regulations because the delegate was not satisfied that the applicant had a genuine intention to marry his sponsor or that the parties genuinely intend to live together as spouses.
4. The sponsor, Ms Nguyen, appeared before the Tribunal on 12 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Pham and Mr Duong Cam Vuong (witness). The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
5. Ms Nguyen was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties genuinely intend to marry and live together as spouses, both at the time of application and at the time of this decision.
8. Ms Nguyen is a 49 year old Australian citizen by grant. The Tribunal accepts that Ms Nguyen was previously married in September 1999 and that this marriage ended in divorce in June 2006. The Tribunal accepts that Ms Nguyen does not have any children.
9. Mr Pham is a 46 year old Vietnamese national currently residing in Ho Chi Minh City. The Tribunal accepts that Mr Pham was previously married in October 1995. This marriage ended in divorce in December 2013. Mr Pham has two sons from this relationship (and in total): Mr Minh Huy Pham (born 20 November 1997) and Mr Minh Hoang Pham (born 24 October 2000). Both are secondary applicants to this application.

Does the visa applicant intend to marry an eligible person?

10. Clause 300.211 requires that at the time of application Mr Pham intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the intended spouse (Ms Thi Hoang Van Nguyen) became an Australian citizen by grant on 26 January 2005 and was identified in the Subclass 300 visa application. Accordingly, the requirements of cl.300.211 are met.

Was the visa applicant 18 at the time of application?

11. Clause 300.212A requires that Mr Pham has turned 18. The Tribunal is satisfied that Mr Pham is over the age of 18. On the evidence before it the Tribunal finds that cl.300.212A is met.

Is the visa applicant sponsored as required?

12. Clause 300.213 requires that at the time of application Mr Pham is sponsored by Ms Nguyen, and that Ms Nguyen has turned 18. Based on the evidence before it, the Tribunal is satisfied that Mr Pham is sponsored by the prospective spouse and that the prospective spouse is over the age of 18. Therefore, cl.300.213 is satisfied.

Have the applicants met in person and are they known to each other personally?

13. Clause 300.214 requires that the parties have met in person since each of them turned 18 and that they are known to each other personally. Based on the evidence before it the Tribunal accepts that the parties had met in person before the application was made and both were over the age of 18 at the time they first met. The Tribunal finds that at the time of application the parties had met and were known to each other personally. Accordingly, the Tribunal finds that the requirements of cl.300.214 were met at the time of application.

Do the parties genuinely intend to marry?

14. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. Mr Pham previously submitted evidence from a marriage celebrant in Australia that states that the parties lodged a notice of intended marriage and that the intended marriage was scheduled to take place on 20 May 2016. The Tribunal has also had regard to a signed letter (dated 26 June 2018) from a civil celebrant that states that the parties have lodged a revised notice of intended marriage and that the intended marriage is scheduled to take place on 9 February 2019. The Tribunal notes that both parties gave consistent evidence at the hearing about their revised plans for the wedding in Australia. Although the date of the original intended marriage has now passed, taking into account all of the evidence before it, the Tribunal finds that at the time of application the parties had a genuine intention to marry and therefore satisfy the requirements of cl.300.215(a). The revised proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore the requirements of cl.300.215 are met.

Do the parties genuinely intend to live together?

15. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4).
16. While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.

17. *Inception and development of the relationship*

18. The parties first met in Vietnam when Ms Nguyen accompanied her younger sister to inspect a block of land that was owned by Mr Pham. The parties struck up an immediate rapport. Mr Pham subsequently invited Ms Nguyen and her sister to dinner at his house. Mr Pham took Ms Nguyen to the dentist the following day and from there the couple exchanged numbers and began communicating and catching up for dinners and other activities. From 16-18 May 2014 the parties travelled to Vung Tau together for a short trip. On 20 May Mr Pham threw a birthday party for Ms Nguyen and the couple declared their love for each other. Ms Nguyen returned to Australia the following week but the couple kept in regular, near daily, contact. Ms Nguyen has travelled back to Vietnam on five separate occasions since, primarily to spend time with Mr Pham, each time staying at his house.

19. *Financial aspects of the relationship*

20. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
21. The Tribunal accepts that Ms Nguyen is a self-employed hairdresser who runs a salon out of her home. The Tribunal accepts that Mr Pham is an electrician who works in bill collections for a named electrical company in Ho Chi Minh City.
22. The Tribunal accepts that Ms Nguyen periodically transfers money to Mr Pham. The Tribunal has had regard to documentary evidence of money transfers from Ms Nguyen to Mr Pham, in the form of transfer receipts (including six transfers in 2017 totalling \$4,300; three transfers in 2016 totalling \$3,000; and one transfer in 2018 totalling \$1,800). The Tribunal accepts Ms Nguyen's evidence that she sends money for important celebrations including the birthdays of Mr Pham's two sons (who are also secondary applicants to the visa application). The Tribunal notes that the receipts of these transfers submitted as evidence are generally consistent with this claim.
23. The Tribunal accepts that the parties do not have a joint bank account, and do not otherwise pool their financial resources in any way. There is no other evidence before the Tribunal of any joint liabilities and/or legal obligations owed by the parties in respect of each other.
24. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the parties live in separate countries. Accordingly, their physical separation means that, as at the time of this decision, they will have had limited opportunities to pool their financial resources and share their day-to-day household expenses.
25. The Tribunal places limited weight on the financial aspects of the relationship.

26. *Nature of the household*

27. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, living arrangements of the parties and the sharing of the responsibility for housework.
28. The Tribunal notes that Ms Nguyen has travelled to Vietnam on at least five separate occasions since the claimed relationship began, for 3-4 weeks on each occasion. The consistent oral evidence from the parties is that Ms Nguyen has stayed at Mr Pham's house for the entirety of all of these trips. The Tribunal has viewed evidence (in the form of a Jetstar flight booking) that Ms Nguyen has made plans to visit Mr Pham for two weeks in August/September this year. The Tribunal notes that the parties gave consistent oral

evidence about Ms Nguyen's travel to Vietnam and that Mr Pham was aware of the details of the upcoming trip. The Tribunal accepts these claims.

29. The Tribunal notes that although the couple do not share joint responsibility for the care and support of Mr Pham's two sons, Ms Nguyen was able to provide very specific details about the boys' personal circumstances, including living arrangements, education histories and future plans if the visa application succeeds.
30. The Tribunal notes that, at the time of this decision, no evidence has been provided to the Tribunal about any current sharing of the responsibility for housework. This is unsurprising given that the parties live in different countries and have never lived together on a permanent basis.
31. The Tribunal places some positive weight on this aspect of the relationship.

32. *Social aspects of the relationship*

33. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
34. The Tribunal has considered evidence relating to the social aspects of the relationship, including numerous printed photos provided to the Tribunal of the couple socialising together in various settings; signed witness statements by declarants who claim to know the couple; and the largely consistent oral evidence of the parties at the hearing. Both Ms Nguyen and Mr Pham were able to name each other's closest friend when asked and recalled very specific details of each other's extended family composition and circumstances. The Tribunal is satisfied that the parties plan and undertake joint social activities and represent themselves to others as being in a genuine and continuing relationship.
35. The Tribunal accepts that the couple held an engagement party in Vietnam on 1 March 2015. The Tribunal notes the delegate's concerns with various aspects of this celebration. The Tribunal questioned Mr Pham and Ms Nguyen about this event and is satisfied by the consistent responses provided by the parties, including the reasons why some of Ms Nguyen's Vietnam-based family could not attend the event.
36. In view of the evidence before it, the Tribunal places some positive weight on the social aspects of the relationship.

37. *Nature of the persons' commitment to each other*

38. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
39. The consistent evidence of the couple is that they have been in an exclusive and committed relationship since mid-2014, having first met in May 2014 when Ms Nguyen's sister was buying a block of land that was owned by Mr Pham. The parties' evidence is that Mr Pham declared his feelings for Ms Nguyen only a few weeks after their first meeting, having spent considerable time together following that initial meeting. The Tribunal questioned the parties about the rapid inception of the romantic relationship. The consistent evidence of the couple was that they both clearly had feelings for each other from their first meeting and that given their ages and previous experiences in failed marriages, and the fact that Ms Nguyen would soon be returning to Australia, neither wanted to waste time or let the opportunity for the relationship pass. The Tribunal accepts this claim.

40. The Tribunal notes Ms Nguyen's travel history back to Vietnam at frequent intervals to visit Mr Pham is consistent with her oral evidence that she was keen to cultivate and continue the relationship. The Tribunal notes that Ms Nguyen registered her temporary stays at Mr Pham's house for most if not all of these trips. The Tribunal has also had regard to hotel receipts from trips that the couple took together within Vietnam, including to Vung Tau (in 2014), Dong Nai (in 2014) and Ho Chi Minh City in (in 2015). The Tribunal accepts these claims. The couple's consistent evidence, which is supported by some documentary evidence in the form of numerous telephone records, is that the couple spoke almost daily when Ms Nguyen had returned to Australia and they continue to do so up to the time of the hearing.
41. The Tribunal notes the highly consistent evidence of the parties regarding specific elements of their relationship history and the timeline of significant events. This includes the couple's plans for both the registry wedding in Australia scheduled for 9 February 2019 and a more elaborate cultural wedding ceremony in Vietnam planned in December this year.
42. The Tribunal notes that the couple gave highly consistent oral evidence about plans they had made for their future in Australia, in the event that the visa application was successful. This included specific work Mr Pham intends to apply for, where and with whom the couple will live, and detailed plans for Mr Pham's sons to further their education and find suitable employment related to their existing interests and education histories. The Tribunal is satisfied that the couple have had substantive discussions about their future together in Australia and have made credible plans in anticipation of a visa being granted.
43. The Tribunal notes that Ms Nguyen impressed the Tribunal as a credible witness. The couple's evidence about the nature of the relationship and their personal circumstances was both detailed and consistent. The Tribunal questioned both parties about their familiarity with each other and is satisfied that they both demonstrated detailed knowledge of each other's lives suggestive of a couple in a genuine and ongoing relationship. The Tribunal is satisfied that the couple rely on each other for companionship and emotional support. The couple provided a recent example (independently recalled by both parties) where Ms Nguyen was having difficulties with tenants at her home and had sought advice and support from Mr Pham over the phone.
44. The Tribunal notes the concerns raised by the delegate regarding the timing and legitimacy of Mr Pham's divorce from his first wife in 2013. The Tribunal questioned the parties in some depth about Mr Pham's first marriage. The Tribunal notes that there were some inconsistencies in the oral evidence provided by the couple regarding the timeline of Mr Pham's first marriage, including about when the actual marriage broke down, when Mr Pham physically separated from his first wife and when the divorce was finalised. Ms Nguyen stated that Mr Pham divorced his first wife in 2013, that he had separated from his wife a 'very long time' before the divorce, and that the relationship had deteriorated not long after the second son was born (he was born in October 2000). When asked when Mr Pham had physically separated from his first wife, Ms Nguyen said she thought it was about three years prior to the official divorce. Mr Pham's response to similar questions was that the marriage had broken down around 2001-2002 and neither party wanted to 'create problems' by going through the official divorce proceedings. For the sake of their young children, they decided to continue cohabitating even though the relationship had broken down. Ms Nguyen's representative explained that there had perhaps been some confusion around the interpretation of the term 'separate' which may have been taken to mean the breakdown of the relationship and not a physical separation of the parties. The Tribunal notes that this was the only significant inconsistency between the parties' evidence throughout more than three hours of questioning at the hearing. With some hesitation, the Tribunal is prepared to give the parties the benefit of the doubt regarding this explanation.
45. On the basis of the above the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses, and therefore cl.300.216 is met.

Do the parties continue to meet time of application requirements?

46. Clause 300.221 requires that at the time of decision, Mr Pham continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses. Having regard to all evidence of the relationship cumulatively, the Tribunal is satisfied that at the time of this decision Mr Pham continues to meet the above requirements. Accordingly, cl.300.221 is met.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

48. The Tribunal remits the application for Prospective Marriage (Temporary) (Class TO) visas for reconsideration, with the direction that Mr Pham meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.211 of Schedule 2 to the Regulations
- cl.300.212 of Schedule 2 to the Regulations
- cl.300.213 of Schedule 2 to the Regulations
- cl.300.214 of Schedule 2 to the Regulations
- cl.300.215 of Schedule 2 to the Regulations
- cl.300.216 of Schedule 2 to the Regulations
- cl. 300.221 of Schedule 2 to the Regulations; and

the secondary visa applicants meet

- cl.300.311 of Schedule 2 to the Regulations

Scott Clarey
Member